

## **Advisory Opinion 2001 - No. 1**

### **Legislator as Pro Tempore Judge Adopted November, 2001**

#### **Issue**

The Board has received a request from a legislator for an advisory opinion regarding whether the Ethics in Public Service Law prohibits the legislator from serving as a judge pro tempore.

#### **Background**

The question of whether a pro tempore judge may also serve as a state legislator was answered in *Discipline of Niemi*, 117 Wn.2d 817, 820 P.2d 41 (1991). In a unanimous opinion, the Washington Supreme Court held: (1) In the absence of any direct evidence of misconduct, those portions of the Code of Judicial Conduct (Code) having to do with the independence, impartiality, and integrity of the judiciary, are not violated when a state legislator serves as a pro tempore judge; (2) Canon 7 of the Code, having to do with political activity on the part of judges, applies to all judges, including pro tempore judges, and is not a pre condition to employment but a code of conduct which applies once a person is so appointed; and (3) a state legislator's dual service as a pro tempore judge in the superior court does not violate the separation of powers doctrine.

#### **Opinion**

1. There is no inherent conflict of interest when a legislator is appointed as pro tempore judge. Whether conflict of interest is an issue at some point following the appointment is a question of fact at that time.
2. The general prohibition (RCW 42.52.120) against elected officials receiving compensation outside of his or her official duties is not applicable in this instance because, pursuant to the facts presented, the conditions allowing such compensation are satisfied.
3. Pursuant to RCW 42.52.120, this legislator must file with the Ethics Board a copy, or other written notice, of his appointment as pro tempore judge within thirty days of the appointment. The filing requirements of the statute are satisfied if subsequent appointments are filed within thirty days after the appointment takes place. Absent additional facts, the Board will not analyze these appointments for conflict issues pursuant to the terms of the statute which permits a series of substantially identical contracts to be analyzed as a whole, rather than piecemeal.

## Analysis

### *Conflict of Interest* - RCW 42.52.020

No state officer or state employee may have an interest, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or incur an obligation of any nature, that is in conflict with the proper discharge of the state officer's or state employee's official duties.

The Board has consistently reaffirmed the citizen-legislator concept and the presumption in favor of employment outside the legislature based on the constitutional design of Washington's part-time citizen-legislature. Beginning with Advisory Opinion 1969 - No. 1, adopted as precedent in this Board's first opinion, Advisory Opinion 1995 - No. 1, conflict of interest questions have followed one of two lines of analysis; "per se" or "functional."

In a "per se" analysis the question is whether the conflict is so severe that the employment itself is a violation of the statute. In the "per se" category, lobbying and offering legislative advice or assistance would be conflicts of interest (Advisory Opinions 1969 - No. 1 and 1995 - No. 1). In Advisory Opinion 1998 - No. 6, the Board found that a legislator would have a clear conflict if he served as the executive director of a nonprofit organization which engaged in grass-roots lobbying on a subject which was before the legislature. In the present case, if the legislator would be expected to lobby the legislature on behalf of judges pro tempore or district court judges, the conflict would be per se— in nature. We are presented with no facts which suggest that lobbying the legislature would be a part of this legislator's duties as a judge pro tempore.

The "functional" analysis is similar to the court's reasoning in *Niemi*, and inquires into whether there are any activities of an "outside" job which can come into conflict with legislative duties, thereby requiring the legislator to refrain from such activities. The general rule, stated in Advisory Opinion 1995 - No. 1, is that a legislator:

. . . does not have . . . (an) interest which is in conflict with the proper discharge of legislative duties if no benefit or detriment accrues to the legislator as a member of a business, profession, occupation, or group, to a greater extent than to any other member of such business, profession, occupation or group.

In Advisory Opinion 1995 - No. 4, the Board found that a legislator could participate in the consideration of a bill which could have the effect of increasing the value of a building lot owned by the legislator because the group of landowners was sufficiently large to invoke the citizen-legislator exception. In the present case, the legislator would be presented with conflict of interest issues if he acted on legislation which, for instance, would single out his— district court for special treatment and benefit him as a judge ". . . to a greater extent than to any other member of such business, profession, occupation or group." There is no representation that any such legislation is at this time pending before the legislature.

*Compensation for Outside Activities - RCW 42.52.120*

This statute generally prohibits a state officer's or state employee's receipt of any thing of value under any contract or grant outside his or her official duties. The prohibition does not apply if the contract satisfies a number of conditions: it is bona fide and actually performed; is not within the course of the officer's official duties or under her official supervision; was not expressly created by the officer in his official capacity and would not require unauthorized disclosure of confidential information. The facts in this request are that the contract would be bona fide and not under the supervision of the legislator in his legislative capacity. In addition, the duties of a judge pro tempore are not duties normally performed as part of legislative duties nor is there any indication that the legislator expressly created this judicial office. Finally, the duties of a judge pro tempore would not require the unauthorized disclosure of confidential information

RCW 42.52..010(1) defines "agency."

Agency means any state board, commission, bureau, committee, department, institution, division or tribunal in the legislative, executive, or judicial branch of government. Agency includes all elective offices, the state legislature, those institutions of higher education created and supported by the state government, and those courts that are parts of state government.

If the contract, ( employment with an agency, whether or not evidenced by written document, is a "contract" within the meaning of the statute (Complaint 1999 - No. 5 - Murray)) was awarded or issued as part of an open and competitive process, the contract must be filed with the Board within thirty days after the date of execution. The statute requires this Board to preview all other agency contracts for a conflict of interest analysis.

RCW 42.52.120(2)

(a) . . .

(b) The contract or grant is awarded or issued as a result of an open and competitive bidding process in which the officer's or employee's bid or proposal was the only bid or proposal received and the officer or employee has been advised by the appropriate ethics board, before execution of the contract or grant, that the contract or grant would not be in conflict with the proper discharge of the officer's or employee's official duties; or

(c) The process for awarding the contract or issuing the grant is not open and competitive, but the officer or employee has been advised by the appropriate ethics board that the contract or grant would not be in conflict with the proper discharge of the officer's or employee's official duties.

The statute also provides, and the Board has followed the practice, that a series of substantially identical contracts or grants may be analyzed as a whole, rather than piecemeal.

